

Civil Rights Work Group:

MISCELLANEOUS REMEDY AMBIGUITIES

SB 238

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Oregon Law Commission
Deputy Director

From the Offices of Executive Director
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and
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Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introductory Summary

Oregon statutes provide that it is generally an unlawful discrimination violation for employers to discriminate against employees who are volunteer firefighters when they require a leave of absence to perform their duties, employees who use tobacco products during nonworking hours, and members of the Legislative Assembly whose employment is interrupted by reason of performance of official duties. See respectively ORS 476.574, ORS 659A.315, and ORS 171.120. Oregon statutes, however, do not define the remedies that are available for violation of these statutes. ORS 659A.885 is the statute that generally provides for the remedies for the various unlawful employment discrimination practices found throughout Oregon's statutes. This bill then would define the remedies available for violations of these provisions in ORS 659A.885.

History of Reform Efforts

In 2001, the Oregon legislature enacted legislation recommended by the Oregon Law Commission's Civil Rights Work Group to reorganize ORS Chapter 659 and amend other statutes outside Chapter 659 relating to unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the

reorganization bill. HB 2275 (2003) restored “age” as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Rights Work Group¹ in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette

¹ The Work Group included the following members:

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| Jeffrey Chicoine | Newcomb, Sabine, Schwartz, and Landsverk LLP |
| Barbara Diamond | Smith, Diamond & Olney |
| Corbett Gordon | Fisher & Phillips LLP |
| Bob Joondeph | Oregon Law Center |
| David Nebel | OSB |
| Marcia Ohlemiller | BOLI |
| Louis Savage | DCBS |

Interested Participants:

| | |
|---------------------|---|
| Patricia Altenhofen | Cascade Employers |
| Leslie Bottomly | Ater Wynne LLP |
| Barbara Brainard | Stoel Rives LLP |
| Clay Creps | Bullivant, Houser, Bailey PC |
| Patricia Haim | Amburgey & Rubin PC |
| Sandra Hansberger | Lewis & Clark Clinic |
| Victor Kisch | Tonkon Torp LLP |
| Stacey Mark | Ater Wynne LLP |
| Andrea Meyer | ACLU |
| Karen O’Kasey | Hoffman, Hart & Wagner LLP |
| Kathy Peck | Williams, Zografos & Peck PC |
| Edward Reeves | Stoel Rives LLP |
| Dennis Steinman | Kell, Alterman & Runstein LLP |
| Diana Stuart | Goldberg, Mechanic, Stuart & Gibson LLP |
| Nathan Sykes | Schwabe, Williamson & Wyatt PC |
| Annette Talbott | BOLI |
| Jerry Watson | Oregon Law Commission |

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

Statement of the Problem Area

The legislature has clearly provided a right to file a claim with the Bureau of Labor and Industries or to file a claim in court for certain unlawful discrimination by an employer based on the employee's service as a volunteer firefighter, use of tobacco during nonworking hours, or service as a member of the Legislative Assembly. The problem is that the legislature has not defined the remedies available to an employee when a claim is successful. The general reason for this bill is based on the theory that all civil rights statutes should have clear rights and remedies so as to provide clarity in the law and avoid litigation on such matters.

Objective of the Proposed Bill

The objective is to amend ORS 659A.885 to clearly provide for remedies for the employment discrimination violations of ORS 171.120, ORS 476.574, and ORS 659A.315. This statute already provides for the remedies of over twenty other unlawful employment discrimination violations. Oregon's present statutes do not define the remedies. Protection from unlawful employment discrimination is not meaningful without clear remedies.

Proposal

See SB 238 (2005) and Amendments.

Section 1

Section 1 amends **ORS 659A.885(2)** to include violations of ORS 171.120, ORS 476.574, and ORS 659A.315. This amendment, to include these violations in the list of subsection (2), establishes a reference back to the remedies provided in (1) of the same statute. **ORS 659A.885(1)** provides for the following rights and remedies:

- a right to file a civil action in circuit court to be tried before a judge with *de novo* review on appeal
- injunctive relief
- prevailing party costs and reasonable attorney fees at trial and on appeal
- other equitable relief as may be appropriate, including
 - reinstatement of the employee
 - hiring of the person
 - back pay

The Civil Rights Work Group discussed also amending **ORS 659A.885(3)** to include violations of ORS 171.120, ORS 476.574, and ORS 659A.315. Such an

amendment would authorize the court to award additional remedies to those provided in 659A.885(1). ORS 659A.885(3) provides for the following remedies:

- a right to file a civil action in circuit court to be tried before a jury with review by the standard in Section 3, Article VII (amended) of the Oregon Constitution (any evidence review for factual issues).
- compensatory damages or \$200 (whichever is greater)
- punitive damages

The Work Group and the Commission discussed at length whether it was appropriate to put violations of ORS 171.120, ORS 476.574, and ORS 659A.315 into only the subsection (2) list or both the subsection (2) and (3) lists. Obviously the subsection (3) provision provides more compensation for an employee and the potential remedies also punish an employer more. The Work Group concluded that there were not readily discernible distinctions for the variances for finding some employment discrimination claims in only the subsection (2) list and some in both the subsection (2) and (3) lists.

For example, ORS 659A.230 is in both lists, but ORS 659A.194 is only in the subsection (2) list. The former statute provides that it is an unlawful employment practice to discriminate against employees who initiate or aid in administrative, criminal or civil proceedings. The latter statute provides that it is an unlawful employment practice to discriminate against an employee who is a crime victim that attends a related criminal proceeding. These two provisions seem similar and would seem to have similar public policy justifications; however, the two have very different remedy provisions.

Another example is that the provisions regarding discrimination against disabled persons (ORS 659A.100 to ORS 659A.145) provide for both the subsection (2) and (3) remedies, but discrimination based on race, religion, color, sex, national origin, marital status or age under ORS 659A.030 provides only for subsection (2) remedies.

Still another example is that a violation of ORS 659A.043 permits remedies under both subsections and ORS 659A.063 permits remedies only under subsection (2). Both of these statutes relate to discrimination of employees who are injured on the job.

The Work Group noted that of the three employment discrimination claims this bill addresses, the tobacco use provision would seem to be the least attractive to receive the subsection (3) remedies. The Work Group was more inclined to support jury trials, and compensatory and punitive damages for firefighters and legislators. The Work Group ultimately decided to provide all three of these violations with the same remedies in the bill, but leave it to the Oregon Law Commissioners to recommend the bill as is, or to recommend deletion of one or more of the provisions from the subsection (3) list.

The Commission, at its February 17, 2005 meeting, decided to amend the introduced bill and remove the ORS 659A.885(3) remedies. The Commission decided to add the ORS 659A.885(4) remedies for ORS 476.574 (volunteer firefighters) and ORS

171.120 (Legislative Assembly members), but not for the ORS 659A.315 (tobacco use) claims.

ORS 659A.885(4) provides that the court may provide for the following remedies:

- the ORS 659A.885(1) remedies (see discussion above)
- compensatory damages or \$250 (whichever is greater)

These remedies represent a middle ground position. The Commissioners decided that as a policy matter they didn't support costly jury trials and punitive damages for any of these three types of claims, but they did determine that compensatory damages were appropriate. The statute already provides for this middle ground approach in subsection (4) and thus the SB 238-1 amendments make that change.

ORS 659A.885(5) is also amended. This amendment is simply a conforming amendment to the amendments made in SB 239, which is also an Oregon Law Commission sponsored bill. The amendment standardizes the list of protected classes to provide consistency to the ORS.

Section 2

Section 2 simply makes style and word edits to ORS 171.120 (Legislative Assembly discrimination provision) to conform with Legislative Counsel drafting protocols. The section is not intended to make substantive law changes.

Section 3

Section 3 simply makes style and word edits to ORS 659A.315 (use of tobacco products discrimination provision) to conform with Legislative Counsel drafting protocols. The section is not intended to make substantive law changes.

Section 4

Section 4 provides that amendments to the ORS made by this bill apply only to conduct giving rise to a cause of action occurring on or after the effective date of the Act. No emergency clause is provided and thus the Act will become effective on the customary date of January 1, 2006.

Amendment Note

Amendments to the introduced bill were made in the Senate. The amendments reflected the remedies the Commission endorsed at its February 17, 2005 meeting. The above report explains the bill and the amendments.